STATE OF MICHIGAN
IN THE SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

vs **Supreme Court No. ~~131088~~ 145594**

WILLIAM CRAIG GARRETT,
Defendant-Appellant.

Court of Appeals No. 263683
Third Circuit Court No. 95-3838

PLAINTIFF-APPELLEE'S BRIEF ON APPEAL
ORAL ARGUMENT REQUESTED

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Plaintiff-Appellee concurs with Defendant-Appellant's statement regarding the basis of this Court's jurisdiction.

COUNTERSTATEMENT OF QUESTION PRESENTED

I.

To merit relief on collateral appeal, a defendant must bear three burdens: (1) show that the grounds raised were not already rejected on direct appeal; (2) prove that the grounds are significant enough to have changed the outcome of trial; and (3) demonstrate either (a) good cause for failing to raise the grounds on direct appeal or (b) that he is actually innocent of the crime. Defendant cannot carry any of these burdens. Was his motion for relief from judgment properly denied?

The trial court answered, "Yes."

The Court of Appeals answered, "Yes."

The People answer, "Yes."

Defendant answers, "No."

COUNTERSTATEMENT OF FACTS

Sometime shortly before the dinner hour on March 14, 1995, a neighbor looked out her window and saw 86-year-old Eleanore Neault crawling across the lawn between their rural houses. (1b-2b.) Having been alerted by her dogs barking, Mary Smyth ran out to help Mrs. Neault, and discovered that her elderly neighbor had injuries on both sides of her face. (3b) Mrs. Neault excitedly told Smyth that a man from the furnace company was in her house, and that he had beaten her up and taken her money. (4b) When the police and Mrs. Neault's daughter-in-law arrived, she told both the same: that the man who had hit and robbed her was "Craig" the furnace man who had been there the previous Friday—undisputedly, defendant. (5b-7b.)

Records from Century Comfort Center confirmed that defendant had been dispatched to Mrs. Neault's residence on Friday, March 10, to clean her furnace. (8b.) Both Elizabeth Neault—the daughter-in-law—and Mrs. Neault identified defendant as the technician from Century Comfort; a fact which defendant also admitted to the police. (9b.) The two women later testified that defendant had acted so suspiciously during his visit that they called the police to report him: he had asked to use the bathroom twice in less than an hour, and he had insisted that Mrs. Neault purchase a $2,500 or $3,000 repair that the Neaults later determined was unnecessary. (10b-16b.)

On the next Tuesday, the 14th, as Mrs. Neault was on her way out of the house to pick up the mail, she was met at her door by a man claiming to be from the water company, supposedly needing to check her water, despite the fact that her home was serviced by a well. (17b-19b.) Nevertheless, the man had boots on and a clipboard and said he had taken care of the neighbors across the street, so Mrs. Neault let him in. (18b, 20b.) After having traversed the 200-foot driveway and returned to the garage with the mail, she discovered defendant had come up behind her. (17b.) He offered to help her with the door, which she allowed.

Once inside, defendant started up again about the furnace. (22b.) But when Mrs. Neault repeated that he was not to touch it and that she was getting a second opinion, defendant told her he needed money. (23b.) At first her refusal to help him annoyed defendant, but when it became obvious Mrs. Neault would not budge, he became angry and slapped her hard in the face. (24b-25b.) Mrs. Neault then saw defendant had a knife in his hand, which he hit her with in the back of the head and threatened to use on her face. (26b.)

Defendant said "I know you have money" and insisted she tell him where it was. (27b.) Mrs. Neault complied, showing him an oblong tin can on a shelf behind some other cans in the basement. Inside were three fifty-dollar bills, which defendant

took. Believing defendant had been distracted by the sight of the cash, Mrs. Neault escaped out of the garage. (27b-29b.)

Neither she nor Mary Smyth saw defendant or the man from the "Water Board" leave the house. (30b-32b.) But when she returned, Mrs. Neault discovered that several rooms had been ransacked, and an additional $30—her grocery money—had been taken from her bedroom. (33b-35b.)

After hearing from Mrs. Neault that her assailant was Craig the furnace man from the Friday before, and determining from Century Comfort both that defendant had been assigned the job and that he was currently on another call in Clawson, police officers drove to the given address to apprehend him. (36b-37b.) According to Officer Shawn Corbett of the Plymouth Township Police Department, when defendant saw him coming to get him, he mouthed the word "no" and tried to run. (38b.) Further checking with defendant's employer revealed that defendant had only been on staff for two weeks, and that he had no assignments on the 14th between 2 p.m. and 6 p.m. (39b-41b.) None of the proceeds or implements of the robbery—the three fifties, the other bills totaling $30, or the knife—were found on defendant or in his work truck. (42b-44b.)

At trial, defendant claimed he was elsewhere during the robbery and called several witnesses to vouch for his whereabouts between two and six that afternoon.

Patricia Moyd—a Century Comfort customer—testified that defendant had been at her home in Detroit from 2 p.m. until just before three. (45b.) Defendant's girlfriend (and the mother of his child) said that he showed up at her mother's in Warren at about 3:15, and that they drove to her uncle's house in Hazel Park together, where he left her at 3:45. (46b-49b.) The girlfriend's mother—Sandra Dixon—testified accordingly. (50b-55b.) According to Sharlene Stewart, defendant stopped by her home in Hazel Park from 3:50 to 4:30. (56b-59b.) Stewart acknowledged she knew defendant from grade school and that he was a friend of her husband. (56b.) Stewart's father, who also claimed he was present, testified similarly. (60b-61b.) But only defendant's girlfriend could say why she was certain that the date had been March 14. (62b-66b.) According to her, she remembered because the next day she found out that defendant had been arrested. (67b.)

Another friend of defendant's—Freddie Lockhart—testified that he ran into defendant as he (Lockhart) drove home from work at about twenty after four. (68b.) Lockhart lives in Hazel Park too, and recognized defendant in his white company truck. After Lockhart went to the store to get pop and cigarettes, he saw defendant again at Joe Benke's house. According to Lockhart, the three men talked out in the street for about an hour, hour and a half. At about a quarter to six, defendant's beeper went off and he left. (69b.) Marie Poma, Benke's live-in girlfriend, also testified that

defendant was out in the street with Benke and Lockhart when she left for work a little before 5 p.m. Poma was not a friend of defendant's and knew him only through Benke. (70b-71b.)

Defendant had at least one more witness—Shirley Gignac—but he did not call her. In fact, his defense team encouraged her not to show up for court at all. (72b-74b.) But when she came with the Neault family anyway—they live across the street from each other—the prosecutor spoke with her and discovered that she had important information to share. Called to testify in the People's case, Gignac related that, on the day of the robbery, she had seen a man pull into her driveway at just after 4 p.m., which she specifically remembered because she listens to the same radio program from three to four every afternoon and the program had just ended. (75b.) Within a few minutes afterward, she saw a medium-blue pickup pull in her drive and a man get out. (76b-77b.) Thinking that he must be coming to her door, Gignac got up from the bench she was sitting on and walked to the front door. But the man—who by that time was only 20 feet away—got back in the truck and hurried off, without even closing the tailgate. (78b.) Gignac saw him drive right across the street, and within about an hour, police cars had arrived at the victim's residence. (79b.) Gignac positively identified the man she'd seen in her driveway right before the crime: it was defendant. (80b-81b.)

Based on the identification of the Neaults and Shirley Gignac, defendant's jury convicted him of armed robbery, and he was sentenced as a habitual fourth offender to 15-to-30 years' imprisonment. As a part of his direct appeal, defendant filed a motion to remand for an evidentiary hearing, alleging newly discovered evidence: that Mrs. Neault had suffered a brain tumor and several strokes in the years preceding the robbery; that Joe Benke should have been called to testify as an eighth alibi witness; and that defendant, Benke, and Sharlene Stewart had passed polygraph tests regarding the alibi testimony. A panel of the Court of Appeals granted the motion, and then-Third Circuit Judge Sean Cox conducted the evidentiary hearing.

After hearing from Benke and the others, Judge Cox granted defendant's motion for a new trial, ruling that a reasonable likelihood existed that had Benke testified at trial a different result was probable. Judge Cox also found that the evidence regarding Mrs. Neault's medical condition would *not* have changed the result had it been introduced, because her medical records showed that it was not until after the robbery "that complainant showed signs of failing mental health." (Defendant's Appendix at 15A.) The Court of Appeals peremptorily reversed, however, finding that neither Benke's existence nor his claims were newly discovered: both were clearly known to defendant before trial.

Seven years after this court denied leave to appeal, defendant filed a motion for relief from judgment, raising the same issues related to Benke and Mrs. Neault's identification, although this time posturing them as evidence that trial and appellate counsel had been unconstitutionally ineffective. Judge Linda Parker denied the motion, ruling that the *Strickland* prejudice prong had already been decided against defendant by the Court of Appeals: Benke's proposed testimony was cumulative of the seven other alibi witnesses he presented at trial.[1]

The Court of Appeals denied defendant's application for leave to appeal on June 8, 2012; this court granted leave on March 29, 2013.

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[1]She also held that an independent basis existed for Mrs. Neault's identification: she did not rely on a photograph of defendant shown to her before the preliminary examination, but rather her memory of him from their lengthy interaction on the Friday before the robbery.

INTRODUCTION

The trial is not a tryout on the road
for what will later be
the determinative federal habeas hearing,
but rather it is the main event.
— Justice Rehnquist[2]

The [trial's] the thing.
— Hamlet, Act 2, Scene 2

Considering that it was 1989 when Michigan codified the motion-for-relief-from-judgment procedure, including the good-cause requirement of MCR 6.508(D)(3) and its actual-innocence exception, and in light of the fact that no opinion of this Court has yet interpreted that exception, the Court's grant of leave in this case is understandable. The problem, though, is that subsection 508(D)(3) has almost no bearing here: defendant's claims are not precluded because he *could* have raised them on direct appeal, it's that in fact they *were* raised and have already been rejected. So the actual-innocence exception noticed by the Court is actually irrelevant to the case at bar.

In any event, the contours of the exception should not be a mystery: actual innocence is unquestionably an incorporation of the federal "miscarriage of justice" jurisprudence in habeas cases, and should be interpreted according to federal

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[2] *Wainwright v Sykes*, 433 US 72, 90 (1977) (internal quotations and citation omitted).

standards. Under federal law, two things hold: one, any claim of actual innocence must be proved by new evidence that would have prevented any reasonable juror from voting to convict; two, any claim of actual innocence must be underlain by a constitutional violation at trial. Here, defendant's new evidence is cumulative of what he introduced at trial, and his allegation that the trial was infected by error of constitutional dimension stretches credulity.

If the Court desires to use this case to further clarify what is meant by "significant possibility that the defendant is innocent of the crime" as found in MCR 6.508(D)(3), that is a laudable goal. But the Court should refrain from re-writing the court rule in order to throw open the doors of justice to any prisoner who claims he is innocent. Except in cases of DNA exoneration, which are already covered by statute, there is no substitute for the mechanism that has been in place in this country since its inception for drawing the line between guilt and innocence: the trial. Appellate courts exist to ensure those trials are conducted fairly, not to re-litigate the principal question. Moreover, in the extraordinary case where a prisoner can prove his innocence outside the DNA context, Michigan law already provides a remedy—the authority of the Governor to grant pardons. Any attempt by courts of this state to second-guess jury verdicts on substantive grounds not only diverts critical

resources and attention away from the main event, it encroaches on powers reserved for the executive.

Whatever the Court rules in this case about the meaning of "actual innocence," the denial of this specific defendant's MFRJ should be affirmed, and the central role of trials in general preserved.

ARGUMENT

I.

To merit relief on collateral appeal, a defendant must bear three burdens: (1) prove that the grounds are significant enough to have changed the outcome of trial; (2) show that the grounds raised were not already rejected on direct appeal; and (3) demonstrate either (a) good cause for failing to raise the grounds on direct appeal or (b) that he is actually innocent of the crime. Defendant cannot carry any of these burdens. His motion for relief from judgment was properly denied.

Standard of review:

This court reviews a trial court's decision on a motion for relief from judgment for abuse of discretion and its findings of fact for clear error. *People v Swain*, 288 Mich App 609, 628 (2010). An abuse of discretion occurs when a trial court chooses an outcome falling outside the range of reasonable and principled outcomes. *Id.* at 628–29. Questions of law are reviewed de novo. *People v Kimble*, 470 Mich 305, 308–09 (2004).

Discussion:

Defendant's motion for relief from judgment was properly denied for three reasons: first, the grounds for relief advanced here are cumulative of evidence defendant produced at trial and could not possibly have changed the earlier result; second, all his grounds for relief were already rejected on direct appeal; and third,

defendant cannot demonstrate that the cumulative evidence he points to on collateral attack proves his innocence. Thus, defendant has surmounted none of the procedural hurdles to relief presented by MCR 6.508(D), and his attempt to bypass those hurdles by claiming actual innocence is futile, both because that claim is legally precluded and because, factually, defendant cannot possibly prove he did not commit the crime.

More specifically, defendant has not demonstrated that his trial and appellate attorneys rendered constitutionally ineffective assistance by not presenting Joe Benke's alibi testimony at trial and by not raising the issue in defendant's direct appeal. Benke was interviewed by an investigator before trial and defendant has not even attempted to negate the likelihood that the decision not to call him at trial was strategic. Moreover, even if defendant could show that Benke should have been called, he has already litigated the prejudice prong and lost on direct appeal—a decision which MCR 6.508(D)(2) renders final and thus not reviewable here. Finally, defendant cannot skirt the "good cause" requirement of MCR 6.508(D)(3) by alleging actual innocence: legally, an "actual innocence" claim requires an underlying constitutional violation which defendant cannot prove; factually, "actual innocence" requires defendant to demonstrate that no reasonable juror would convict him considering all the evidence, and, since the evidence has not materially changed since

his jury found him guilty, there is no way he can meet his burden. Thus, this Court must affirm Judge Parker's denial of defendant's motion for relief from judgment.

A. Defendant cannot meet the good cause and actual prejudice requirements of MCR 6.508(D)(3), because he can't show that trial counsel didn't have a good reason not to call Joe Benke to testify, nor can he prove that the decision affected the outcome.

Because defendant has failed to rebut the presumption that not calling Joe Benke was a strategic decision, he cannot prove that his trial and appellate attorneys acted in an objectively unreasonable fashion regarding this issue. As the Court knows, in order to be entitled to relief under MCR 6.508(D)(3), a defendant must show "good cause" and "actual prejudice" for the failure to raise an issue on direct appeal. Generally, the good-cause prong may only be satisfied by a showing of newly discovered evidence or ineffective assistance of appellate counsel. See *People v Kimble,* 470 Mich 305 (2004); *People v Cress*, 468 Mich 678, 692 (2003). Defendant's newly discovered evidence claim related to Benke has already been rejected by this court (108b), and so defendant has re-raised it as ineffective assistance of appellate counsel.

The test for ineffective assistance of appellate counsel is the same as that for trial counsel. *People v Reed,* 198 Mich App 639, 646 (1993). Thus, a defendant alleging ineffective assistance of counsel must demonstrate that his attorney acted in

an objectively unreasonable fashion and that, but for counsel's error, the result of the proceedings probably would have been different. *People v Leonard*, 224 Mich App 569, 592 (1997). But this Court has also stated that "appellate counsel's decision to winnow out weaker arguments and focus on those more likely to prevail is not evidence of ineffective assistance." *People v Reed*, 449 Mich 375, 391 (1995). In other words, appellate counsel is not ineffective for omitting issues on appeal, *even if the omitted issues are meritorious*, as long as it could have been a sound strategic decision to leave them out. Correspondingly, it is not unconstitutionally ineffective to "exercise reasonable professional judgment in selecting those issues most promising for review." *Id.* at 647. The test is *not* whether, in hindsight, appellate counsel failed to raise all arguable or colorable claims. *Id.* at 382. Such a test would "undermine the strategic and discretionary decisions that are the essence of skillful lawyering." *Id.* at 386-87.

Defendant cannot show that his appellate attorney acted unreasonably and prejudiced the appeal by winnowing out the Benke issue defendant raises here. First, there is reason to believe that defendant's trial attorney—Sanford Schulman—made a conscious choice, based on factors that are not of record, to forego Benke's testimony. It is nearly certain that a defense investigator interviewed Benke before

trial. (128b-131b.[3]) Not only that, but counsel called Benke's live-in girlfriend instead of him, and obviously both she and defendant would have known that Benke was also present at the relevant time.

Defendant has never explored the reason why Schulman chose not to call Benke, and the law *presumes* that the choice is reasonable, unless there could not possibly be a valid reason. But it is entirely possible—and defendant has not attempted to meet his burden of proving otherwise—that trial counsel concluded one or more of the following: (a) that Benke would not be a good witness, (b) that Benke did not actually remember seeing defendant on March 14, (c) that Benke might reveal other facts harmful to defendant's case, (d) that Marie Popa—Benke's live-in girlfriend, who offered the same testimony as Benke supposedly would have—was more credible because she had a better reason to remember the date and less of a connection to defendant, (e) that Benke's testimony in addition to Popa's and Lockhart's would be cumulative and thereby risk alienating defendant's jury, or (f) that some other reason existed known only to attorney Schulman.

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[3]Benke appeared to claim at the evidentiary hearing in 1999 that he had not been contacted about his potential testimony until after the trial, but this is obviously wrong. To begin with, Marie Popa's testimony strongly suggests that Benke was interviewed by a defense investigator at the same time she was, because in the same breath as she mentioned the investigator, she stated that even though he talked mostly to Benke, she was the one told to come and testify. (129b.) Additionally, while the trial was in 1995, the insurance investigator didn't interview Benke until September 5, 1997. (132b)

Bottom line: by never allowing Schulman to put his reasons on the record, defendant abandoned his opportunity to prove that the choice wasn't strategic. By default, then, he loses both his claim that Schulman was ineffective, and, by necessity, that his direct-appeal attorney was ineffective for failing to address Schulman's alleged substandard representation.[4] Defendant thus stumbles over hurdles numbers one and two.[5]

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[4]Defendant's direct-appeal attorney almost certainly considered and rejected the ineffective-assistance-of-trial-counsel argument: he clearly identified the Benke issue but chose to raise it as newly discovered evidence even though Benke was not newly discovered. In other words, defendant has never called his direct appeal attorney to testify either, and so has never rebutted the presumption that the attorney intentionally rejected the ineffective argument because he knew that Schulman had a good reason for his choice.

[5]Defendant also maintains that his trial and appellate attorneys should have challenged Mrs. Neault's identification of defendant because she was shown a single photograph of him before the preliminary examination. The People will refrain from directly belittling this argument, recognizing the ever-present reality that even good lawyers can grossly underestimate their opponent's case. See *Bennett v State Farm Mutual Insurance Co*, ___ F3d ___ (CA6, 2013). Nevertheless, hubris aside, defendant cannot possibly prevail on this claim. First, although Mrs. Neault said that someone had showed her defendant's picture before the preliminary examination, the police denied this had happened. In other words, it is not clear that defendant could have proved that the alleged show up even took place. Second, even if it had, Mrs. Neault spent an hour at her home with defendant four days before the crime. Correspondingly, on the day of the crime, before she was shown any kind of photo, she informed everyone who asked that the perpetrator was Craig from the furnace company who had been there the previous Friday. As Judge Parker held, the victim had more than a sufficient independent basis for her identification. See *People v Kachar*, 400 Mich 78 (1977). Third, because of the factual uncertainty about the alleged show up and the substantial independent basis for the identification, a reasonable attorney could chose not to raise what was almost certainly a meritless issue. See *People v Hawkins*, 245 Mich App 439, 457 (2001). This is especially true since it is not necessarily unduly suggestive to present a witness with a single photograph of the alleged perpetrator. "[T]here is no per se rule condemning as constitutionally infirm all evidence derived from single photo identifications." *US v Arruda*, 757 F Supp2d 66, 69 -70 (D Mass, 2010) (internal punctuation omitted). See also *Kado v Adams*, 971 F Supp 1143, 1148 (ED Mich, 1997). In fact, the US Supreme Court has upheld a single-photo lineup,

He also trips on hurdle number three: he cannot show that Schulman's decision not to call Benke, even if unreasonable, likely affected the outcome of trial. That is, Benke's testimony would have added very little, if anything, to defendant's case, because Popa testified that defendant was at her and Benke's home at essentially the same time as the crime occurred. The testimony of Elizabeth Neault, Shirley Gignac, and Mary Smyth conclusively established that the attack occurred sometime between 4 and 5:30 p.m. on March 14, 1995. Elizabeth had stopped by her mother-in-law's house at 3:30 on the 14th, and left 15 minutes later. (82b-83b.) At 4 p.m., she phoned to tell Mrs. Neault that she had reported to the Plymouth police defendant's suspicious behavior on the Friday before. (84b-85b.) Nothing was amiss at that point. Similarly, neighbor Gignac saw defendant pull into her driveway and get out of his truck shortly after her radio program ended at 4. (86b.) She also watched him get back in and quickly drive across the street after she got up from her perch thinking she would meet him at the door. And the attack and robbery had to have ended by shortly after 5 p.m., because next-door-neighbor Mary Smyth saw Mrs. Neault

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where the witness got a good look at the defendant and where the photo was used more to confirm the identity of the perpetrator than to identify him in the first instance. See *Manson v Brathwaite*, 432 US 98, 116, 97 S Ct 2243, 2254 (1977). It was not objectively unreasonable, given all this, to forego this issue at trial and to winnow it on direct appeal.

crawling across the yard sometime after 5, and by approximately 5:30 Elizabeth Neault had been notified about what had happened. (87b-88b.)

But both Maria Popa and Freddie Lockard maintained that defendant had been 30 miles away in Hazel Park at 4:45, which would make it physically impossible for him to have beaten and robbed Mrs. Neault after 4 p.m. in Plymouth, especially given her testimony that the ordeal lasted 45 minutes. Specifically, Popa testified that she saw defendant at her home as she left for work at 4:45. (89b.) She had to be on the job at Ruby Tuesdays at 5 p.m., and so was fairly certain of the time. Lockard said that he had gotten off work at 4 p.m., briefly saw defendant in his truck while driving home, and then saw him again after Lockard stopped for pop and cigarettes at a convenience store. Like Popa, Lockard claimed that he spoke with defendant in front of Popa and Benke's home in Hazel Park at about 4:45 on March 14. (90b-92b.) But unlike both Benke and Lockard, who were friends with defendant, Popa "didn't know Craig that much." In fact, she said she only knew him through her boyfriend Benke. (93b.) In other words, Benke's testimony would have been entirely cumulative of Popa's, but he would have been *easier* to impeach. Thus, defendant cannot demonstrate that calling Benke in his trial would have made any difference.

This is especially so given the other evidence against him. On defendant's initial visit to victim Neault's home on March 10, he tried to shake her down for a

$2,500 part, plus apparently $500 in labor, going so far as to offer to return at 9 p.m. if need be. (94b-96b.) His claimed need to visit the bathroom twice in less than an hour further raised the suspicions of Neault and her daughter-in-law, and likely defendant's jury as well. And while defendant plays down Mrs. Neault's immediate identification of him as the perpetrator, elaborating on her medical history and insinuating mental instability, the fact is that at the time of the crime Mrs. Neault was able to successfully live on her own in her rural Plymouth Township home. Correspondingly, as Judge Cox found after reviewing Mrs. Neault's medical records, her memory issues did not begin until *after* the robbery.

Even more crippling to defendant's case, the neighbor across the street—Shirley Gignac, who was initially located by the *defense investigator*—confidently identified defendant as the man who parked his pickup in her driveway and then hurriedly got back in and drove off when she stirred within the house. Between defendant's suspicious initial behavior, Neault's immediate and unequivocal identification of him after the assault, and the neighbor's corroboration that defendant was in the neighborhood minutes before the crime trying to stash the

getaway vehicle, the evidence at trial could not possibly have been overcome by Benke's cumulative alibi.[6]

Defendant seeks to undermine the weight of this evidence by noting several easily explainable or ultimately minor discrepancies in the People's proofs. Primarily, defendant protests that he was driving a white company truck, not the medium-blue pickup Gignac saw him in, but this evidence *complements* the other facts supporting guilt, not detracts from them. That is, it would have been easy—and smart—for defendant to have ditched his work truck for a couple hours in favor of the blue pickup owned either by defendant's "Water Board" accomplice or some other acquaintance. It further stands to reason that he would not drive up the victim's 200-foot driveway where he might be trapped in, but instead would find a sheltered place somewhere nearby to stash the getaway vehicle. Further, the fact that defendant drove another truck also explains why the police found no money, knife, or blue

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[6]Defendant seeks to bolster Benke's testimony with the fact that he passed a polygraph. But that has no sway here, for two reasons. First, the law in this state has long been that polygraphs are scientifically unreliable. *People v Barbara*, 400 Mich 352, 377 (1977); *People v Rogers*, 140 Mich App 576, 579 (1985). Second, and correspondingly, the results of polygraphs are not admissible at trial. *Id.* Thus, polygraph results have no bearing on the issues here, all of which have to do in one way or another with the question what would a reasonable jury have done given either different tactics at trial by defense counsel or different evidence. An inadmissible polygraph—whether by Joe Benke, Sharlene Stewart, or defendant himself—is entirely irrelevant to that question.

windbreaker in the work truck, and why the tire track mold from the scene did not match the company vehicle defendant was arrested with at 8 p.m.[7]

Defendant also claims that discrepancies about his facial hair call into question Mrs. Neault's identification: she said that defendant didn't have a mustache, but a photo of him taken the day of the crime apparently showed he did.[8] But what defendant omits from his recitation of the facts is that his facial hair on March 14 was so slight as to be almost unnoticeable. Specifically, Elizabeth Neault recalled that, the Friday before, defendant had a "slight mustache"; Police Officer Shawn Corbett seemed to remember that on the day of defendant's arrest he had a "light mustache"; Officer-in-Charge Steven Mann indicated that defendant "had a bit of a mustache and was unshaven"; Shirley Gignac couldn't remember if he had facial hair at all. (97b-101b.) Defendant's mustache was obviously not a prominent feature which any credible witness would be expected to remember.

In short, defendant's jury reasonably believed the testimony of Eleanore and Elizabeth Neault and Shirley Gignac over defendant's alibi witnesses, and the

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[7]Defendant also highlights three discrepancies in the victim's testimony: she didn't consistently describe defendant's knife the same way; she said at the preliminary exam that she had seen a yellow and green truck on the day of the robbery but disavowed that statement at trial; and she said that defendant was clean shaven when in actuality he had a mustache when arrested. Of course, all of these alleged differences were put before defendant's jury, and none caused the jury to doubt defendant's guilt.

[8]The People have been unable to locate the exhibit in their files.

addition of Joe Benke would not have altered that choice. Defendant has failed to show either cause or prejudice for his failure to raise the Benke issue on direct appeal, and those hurdles are—as discussed below—valid procedural bars to relief.

B. Defendant's Benke-related claim is further barred by MCR 6.508(D)(2), because it was already rejected on direct appeal, as were all his other claims.

The Court of Appeals has already rejected the claim that Benke's testimony might have changed the outcome of trial.[9] Defendant makes that claim again here, albeit under the guise of a different legal theory. Regardless, MCR 6.508(D)(2) prohibits the re-litigation of such grounds that were already decided against defendant on direct appeal, and so defendant's MFRJ was properly denied on that basis also.

Subsection (2) of Rule 6.508(D) clearly prohibits relief based on "grounds for relief which were decided against the defendant in a prior appeal" unless there has been a retroactive change in the law. Although this Court has not defined "grounds" for purposes of the Rule, the federal system also has a rule against successive claims,

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[9]See *People v Garrett*, unpublished per curiam opinion of the Court of Appeals, docket number 219803 (dated July 28, 1999). (102b.) Defendant never applied for leave on this issue. The Court of Appeals also ruled that Eleanore Neault's alleged memory impairments were not grounds for relief. See *People v Garrett*, unpublished per curiam opinion of the Court of Appeals, docket number 222304 (dated November 6, 2001). (103b.) This Court denied leave to appeal on January 3, 2003. (108b.) Defendant never appealed Judge Cox's ruling that the other post-trial evidence (polygraph results and testimony from him and Sharlene Stewart) did not constitute newly discovered evidence.

and its cases are instructive. Essentially, they stand for the proposition that a factual predicate rejected on direct appeal may not be re-raised on collateral appeal, even under a different legal theory.[10]

For example, in *Daniels v US*, 26 F3d 706 (CA7, 1994), the petitioner claimed on direct appeal that his indictment was invalid because the grand jury's term had expired. *Id.* at 707-08. The Seventh Circuit denied the claim, holding that the district judge had properly extended the grand jury's term as evidenced by an order which the lower court had entered without notice to defendant or his attorney. *Id.* at 709. Daniels then filed a habeas action, maintaining that the district judge had denied him the effective assistance of counsel by not allowing the attorney to participate in what Daniels characterized as an ex parte evidentiary hearing.

Again, the Seventh Circuit denied the claim, ruling that "while it is true that the defendants' claim is 'new' in the sense that this is the first time that the defendants have labeled it as a Sixth Amendment violation, the reality is that the defendants are simply recapitulating their previous assertion." *Id.* at 711. Thus, Daniels was prohibited from re-litigating the indictment's validity and his lack of participation in the entry of the order "because those questions have previously been decided against

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[10]See *Yick Man Mui v US*, 614 F3d 50, 53-54 (CA2, 2010); *Daniels v US*, 26 F3d 706, 711 (CA7, 1994).

[him]." *Id.*[11] As stated by the Supreme Court in *Sanders v US*, 373 US 1, 16 (1963), a petitioner's direct-appeal and habeas claims "may often be supported by different legal arguments, or be couched in different language, or vary in immaterial respects," but nevertheless constitute "identical grounds" for relief. Or, as the Seventh Circuit put it in a 1997 case, a defendant may not resurrect a claim rejected on direct appeal merely by adding a "new wrinkle" to it. *Alexander v US*, 121 F3d 312, 313 (CA7, 1997).

Defendant responds that the law-of-the-case doctrine upon which these precedents stand is discretionary with this Court, and need not be assiduously observed. But in so doing he overlooks the fact that—in the post-conviction context—MCR 6.508(D)(2) *codifies* the doctrine, and the Rule contains no exception other than for a retroactive change in the law. In this context, therefore, the rule is mandatory.

Thus, defendant cannot overcome the bar against successive motions merely by reframing his Benke claim in different terms. In its July 28, 1999 order reversing Judge Cox's grant of a new trial, the Court of Appeals held that Benke's testimony did not meet the requirements of newly discovered evidence, in part because it was

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[11]See also *US v Pitcher*, 559 F3d 120 (CA2, 2009) (habeas ineffective-assistance claim barred because ineffective-assistance rejected on direct appeal, even though petitioner alleged different facts).

"cumulative of two alibi witnesses who testified at trial as to the time and manner by which they saw and spoke to defendant on the day in question."[12] Defendant then brought the same essential claim in his motion for relief from judgment, only this time switching legal theories to one of ineffective assistance. But the underlying ground was the same: that Benke's testimony would likely have changed the result at trial, a contention that had already been rejected on direct appeal. The rule against successive motions, MCR 6.508(D)(2) prohibits this, regardless whether defendant can establish cause, prejudice, or even actual innocence.[13] For this reason also Judge Parker must be affirmed.

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[12]As indicated in footnote 9, the Court of Appeals also rejected defendant's claims regarding Eleanore Neault's alleged memory impairments, and so that claim is also barred here, for the same reasons. Further, defendant chose not to appeal Judge Cox's ruling that the polygraph results and defendant's and Sharlene Stewart's testimony did not constitute newly discovered evidence, and so that ruling too is foreclosed by 6.508(D)(2).

[13]The People acknowledge that, in the federal system, proof of actual innocence removes the bar to successive or abusive claims. See *McQuiggin v Perkins*, ___ S Ct ___ (2013), citing *Kuhlman v Wilson,* 477 US 436, 454 (1986) (previously rejected claims) and *McCleskey v Zant*, 499 US 467, 494-94 (1991) (claims that could have been raised). But MCR 6.508 is materially different in this respect: the actual-innocence exception plainly and explicitly applies only to "subrule (D)(3)(a)." In other words, abusive claims are allowed under actual innocence, but not successive ones.

C. Defendant's defaulted claims are not resurrected by the actual innocence provision of MCR 6.508(D)(3), because he meets none of the actual innocence criteria.

i. MCR 6.508 is a proper exercise of this Court's constitutional and statutory rule-making authority, and is intended to codify federal habeas corpus jurisprudence, including the federal understanding of "actual innocence."

Both the Michigan Constitution and M.C.L. 600.223 authorized this court to adopt, as it did in 1989, a formalized procedure for post-appeal relief. The motion-for-relief-from-judgment court rule (now MCR 6.500 et seq) arose from this authorization, and the Rule is essentially a codification of federal habeas corpus law. As such, the Rule must be read in conjunction with federal habeas corpus jurisprudence, which bars relief on claims that a defendant could have raised on direct appeal but didn't, unless the defendant brings forth new reliable evidence demonstrating his innocence of the crime, coupled with an underlying constitutional violation at trial which—absent the latter and present the former—would more likely than not have prevented any reasonable juror from convicting him. Defendant cannot carry this burden.

Article 6, § 5 of the 1963 Michigan Constitution requires the Supreme Court to "by general rules establish, modify, amend and simplify the practice and procedure in all courts of this state." Our Legislature has further codified the Court's

jurisdiction in this regard, authorizing the Court to "promulgate and amend general rules governing practices and procedure in the supreme court and all other courts of record, including . . . to prescribe the practices and procedure in the supreme court and other courts of record concerning . . . the granting of new trials." M.C.L. 600.223(2)(c). And Article VI, § 13 of the Constitution further clarifies that the jurisdiction of the circuit courts may be regulated "by rules of the supreme court." Michigan Court Rule 6.500 et seq. is thus a valid exercise of this Court's rule-making authority regarding the granting of new trials. Defendant does not contend otherwise.

Further, the text and history of MCR 6.500 demonstrate that the Rule was intended to incorporate federal habeas jurisprudence into Michigan law so that our state courts could first pass on collateral new-trial claims by state prisoners before those claims were adjudicated federally. That is, both the good cause and actual prejudice requirements were well-established in the federal system as of 1987 when Michigan's Rule was first proposed, and the use of federal terms implies the incorporation of federal standards. More directly, the Committee established by this Court to recommend changes to Michigan's court rules explicitly stated that the proposed Motion for Relief From Judgment (then MCR 7.401) was based on federal law, and was meant to apply the same standards so as to protect the state's interests

in adjudicating post-appeal claims of Michigan prisoners.[14] Defendant acknowledges this truth,[15] and this Court has confirmed that it "chose to model MCR 6.508 after the federal habeas corpus statute." *People v Reed*, 449 Mich 375, 379-80 (1995).

Obviously, this includes the actual-innocence provision found in section 6.508(D)(3). As further evidence of this fact, the same Rules Committee stated that the "actual innocence" exception to the good-cause requirement incorporated the federal habeas jurisprudence announced the year before in *Murray v Carrier*, 477 US 478 (1986). In *Carrier*, the state petitioner's appellate attorney had allegedly forgotten to raise a *Brady* issue regarding statements by the rape victim which the prosecution did not turn over to the defense. Setting aside the merits however, the Supreme Court held that the prisoner's habeas petition had to be rejected because he could not establish cause for the default (he had earlier disavowed any *Strickland* claim), unless on remand he could establish that the victim's statements established

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[14]See Proposed Rules of Criminal Procedure, 428A Mich 1, 49-54 (1987) (121b-124b). Before 1989, when what is now MCR 6.500 et seq was first adopted, Michigan had no straightforward means of adjudicating post-appeal claims, because neither the US Constitution nor the Michigan Constitution requires such procedures. See *Pennsylvania v Finley,* 481 US 551, 557 (1987). In fact, few states had any kind of habeas-like procedures in place before the mid-twentieth century. At that point, state habeas review arose in response to the gradual application of the Bill of Rights to the states, thereby extending federal constitutional trial rights to state criminal defendants and the subsequent oversight by federal courts of alleged violations of these rights by state courts. King & Hoffmann, *Envisioning Post-Conviction Review for the Twenty-Fist Century,* 78.2 Mississippi L Rev 434 (2008).

[15]Defendant-Appellant's Brief on Appeal at 22 n.14.

his "actual innocence." *Id.* at 480. The Final Official Draft of the Criminal Court Rules Committee's proposed rules, published in April 1987, cited *Carrier* in explaining that "subrule (C) permits the court to waive the good cause requirement if the petitioner makes a colorable claim that he is actually innocent of the crime." (124b.) The commentary then quotes *Carrier* verbatim: "Accordingly, we think that in an extraordinary case, where a constitutional violation has probably resulted in the conviction of one who is actually innocent, a federal habeas court may grant the writ even in the absence of a showing of cause for the procedural default." *Id.*, quoting *Carrier* at 496. Michigan's actual-innocence exception is thus intended to be equivalent to its federal counterpart, despite the minor linguistic differences.[16]

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[16]This Court actually changed the Committee's recommended wording of the Rule before adoption, including the provision regarding actual innocence. In that regard, the Court changed the recommended "colorable claim that [the petitioner] is actually innocent of the crime" to "significant possibility that the defendant is innocent of the crime." While the Court has never indicated whether the change signified a different meaning or merely a clarification of the *Carrier* standard, the latter is most likely, given the principle that when interpreting a court rule, courts "must be mindful of the surrounding body of law into which the provision must be integrated." *Haliw v Sterling Heights,* 471 Mich 700, 706 (2005), quoting *Green v Bock Laundry Machine Co*, 490 US 504, 528 (1989) (Scalia, J, concurring) (internal punctuation omitted). Further, "[i]t is appropriate to look to federal case law when interpreting a state [rule] which parallels its federal counterpart." *State Employees Ass'n v Department of Management and Budget,* 428 Mich 104, 117 (1987). A final principle of construction is that an alteration in wording does not necessarily imply a difference in meaning: the Court "might simply have found a better way than the drafters of [the Rule] to express the same proposition." See generally *Jarrad v Integon Nat Ins Co*, 472 Mich 207, 222 (2005) (construing Michigan no-fault insurance law where it differs from the model Uniform Motor Vehicle Accident Reparations Act). In short, absent an express desire to alter the federal law from which the actual-innocence exception was derived, the Court should presume that the standards are the same. See generally *People v Moreno,* 491 Mich 38, 41 (2012) (Legislature will not be found to have altered underlying common law unless signified "in no uncertain terms.")

ii. A showing of actual innocence under MCR 6.508(D)(3) serves only to resurrect claims of constitutional error not raised on direct appeal, and requires a defendant to introduce new, reliable evidence not presented at trial, which (if it had been presented) would have prevented any reasonable juror from voting to convict.

Under federal law, in order for a petitioner to establish "actual innocence," he must present "evidence of innocence so strong that a court cannot have confidence in the outcome of the trial." *Schlup v Delo*, 513 US 298, 316 (1995). According to the *Schlup* Court, such evidence must be as reliable as "exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence." *Id.* at 324. Further, in making an actual-innocence determination, the trial court must consider all the evidence: that which was admitted at trial, that which was wrongfully excluded (if any), and that which has since been proffered by the defendant. *Id.* at 328.[17] The

[17]There is a split among the federal circuit courts as to this last category of evidence. At least one circuit has held that the new evidence offered by the defense must be "newly discovered"—that is, not known to or reasonably discoverable by the defense before trial. See *Osborne v Purkett*, 411 F3d 911, 920 (CA8, 2005). Other circuits take the view that *any* evidence not presented to the jury may be used in determining "actual innocence." See *Gomez v Jaimet*, 350 F3d 673, 679 (CA7, 2003); *Griffin v Johnson*, 350 F3d 956, 963 (CA9, 2003). The Third Circuit has taken a middle road, allowing the use of evidence that could have been discovered but wasn't, while excluding known evidence that the defense chose not to present. See *Goldblum v Klem,* 510 F3d 204, 226 n14 (CA3, 2007). Given the fact that newly discovered evidence would itself satisfy the requirements of cause and prejudice—thus mooting any inquiry into actual innocence—and the strong implication by the *Schlup* Court, both in terms of the language used and the facts of that case, that the exculpatory evidence had to be "new" but not "newly discovered," see 513 US at 324, 327-28, 332, the better view is that of the Third Circuit.

defendant must demonstrate, by a preponderance of the evidence, that given the new evidence no reasonable juror would have voted to convict. *Id.* at 327.

But even if the defendant meets this burden, his showing of actual innocence merely excuses his procedural defaults (that is, failing to present on direct appeal either his newly discovered evidence claim or his ineffective assistance of counsel claim), it does not by itself entitle him to relief. To the contrary, a valid claim of actual innocence is simply a gateway allowing review of an otherwise forfeited claim of error, such that to merit a new trial he still must show that a constitutional violation at trial, together with the absence of the new exculpatory evidence, more likely than not resulted in the conviction of someone no reasonable juror would otherwise have found guilty. *Id.* at 327-28 (1995).

In sum, both federally and in Michigan, a showing of actual innocence does no more than resurrect non-successive procedurally defaulted claims.[18] Or put another way, MCR 6.508(D)(3) (like federal habeas law) requires petitioners to demonstrate "actual prejudice" from *"alleged irregularities"* in the trial before relief may be granted, *even if* the petitioner has established "a significant possibility that [he] is innocent of the crime." But under this paradigm, it is the trial irregularities, not the

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[18]That is, claims that could have been raised, but weren't. See MCR 6.508(D)(3). As indicated, actual innocence does not resurrect successive claims, according to the plain language of the court rule. MCR 6.508(D)(2). See also footnote 13, above.

actual innocence, that form the basis for granting a new trial. Thus, a defendant who cannot establish cause and prejudice for his twin failings on direct appeal (to raise his constitutional claim and to bring forth discoverable exculpatory evidence) may still prevail on a 6.500 motion, but only if he can (1) prove through highly reliable evidence his actual innocence (as that term has come to mean); (2) demonstrate that a constitutional error not previously raised infected his trial; and (3) convince the court that if the evidence had been introduced at trial and the constitutional error had not occurred, it is more probable than not that no reasonable juror would have voted to convict.

iii. MCR 6.508 does not allow "freestanding" claims of actual innocence where there were no irregularities at trial, and neither the Michigan nor the United States Constitution overrides the court rule.

The remedy for a defendant in Michigan who has been convicted in an error-free trial, yet who can demonstrate with certainty that he did not actually commit the crime, is a commutation by the governor. Not only does MCR 6.508 not provide for a judicial remedy in this instance, the rule *prohibits* relief in cases where there were no trial errors, and no higher law requires any other result. Further, this Court may not on its own re-interpret MCR 6.508 or ignore its current provisions to create a new remedy where none exists: doing so would be an exercise in substantive policy-

making violative of separation of powers, not to mention the Court's own procedures of court-rule amendment.

As indicated above, MCR 6.508 requires a defendant to identify an "error" or "irregularity" at trial that either likely affected the outcome or was "so offensive to the maintenance of a sound judicial process that the conviction should not be allowed to stand regardless of the outcome of the case." MCR 6.508(D)(3)(b)(iii). In other words, by conditioning relief upon a showing of error in all cases, the rule itself plainly rejects freestanding claims of actual innocence.

And there is no other law requiring another result. The United States Supreme Court, for example, has never held that a petitioner's actual-innocence claim presents valid grounds for relief absent some underlying trial error. To the contrary, in *Herrera v Collins*, 506 US 390 (1993), the Court said flat out that "actual innocence is not itself a constitutional claim" but rather only a gateway to have otherwise barred constitutional claims considered on the merits. *Id.* at 404. Since *Herrera*, every federal court to have considered the question has held that no freestanding right exists.[19] In no way, then, does the US Constitution invalidate Michigan's rule that

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[19]See *In re Swearingen*, 556 F3d 344, 348 (CA5, 2009); *Fielder v Varner*, 379 F3d 113, (CA3, 2004); *Johnson v Bett*, 349 F3d 1030, 1038 (CA7, 2003); and *Burton v Dormire*, 295 F3d 839, 848 (CA8, 2002). The Ninth Circuit in *Carriger v Stewart*, 132 F3d 463, 376 (CA9, 1997), reviewed petitioner Carriger's actual-innocence claim *as if* there were a freestanding option, but ultimately decided that he didn't meet it.

post-appeal relief from judgment is only available to those who can prove trial defects.

No Michigan law supercedes MCR 6.508 either. For instance, our Constitution has never been interpreted as containing a freestanding actual-innocence claim, and defendant identifies no such precedent. No Michigan statute authorizes such relief, either. The best defendant can do is claim that the conviction of an innocent person violates the due process and cruel and unusual punishment clauses of both US and Michigan Constitutions. But in addition to the fact that no court of competent jurisdiction has ever so held, there is a more fundamental difficulty glossed over by defendant: other than DNA exonerations, there is no way to separate the truly innocent from the guilty—unless of course this Court adopts defendant's solution, opening the courthouse doors to virtually any prisoner who maintains he didn't really do it, and then granting relief to any of those who can demonstrate some "meaningful possibility" of innocence.[20]

To be clear, it is not the People's position that truly innocent individuals should remain incarcerated on the justification that they had a fair trial. Rather, the People maintain that it is the *trial itself* that determines who is guilty and who is innocent.[21]

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[20]See Defendant-Appellant's Brief at 29, 36.

[21]There, "[s]ociety's resources have been concentrated at that time and place in order to decide, within the limits of human fallibility, the question of guilty or innocence of one of its

And while the trial process is not perfect, it is the best possible.[22] Given society's legitimate interest in the finality of convictions and conservation of judicial resources,[23] coupled with a lack of means outside of DNA testing to reliably separate the innocent from the guilty, the trial must continue to serve as the fulcrum of our criminal justice system, not appellate courts almost 20 years removed from the crime who have never seen live testimony, as in this case.

In short, except for DNA exonerations, there are currently no reliable means to know which prisoners are truly innocent, and allowing any prisoner who claims to be innocent entry into the courthouse by virtue of the Fifth or Eighth Amendments will not only provide a poor substitute for the actual trial, it will almost certainly create a flood of new litigation from a class of suitors who have nothing to lose and everything to gain by such filings, regardless of their merit. As Justice Rehnquist observed in *Herrera*, "[f]ew rulings would be more disruptive . . . than to provide for . . . review of freestanding claims of actual innocence." *Id.* at 401.

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citizens." *Herrera, supra,* at 401 (internal punctuation and citation omitted)

[22]Again, DNA exonerations are the exception, but our Legislature has specifically provided a process to ensure that prisoners who can prove by clear and convincing DNA evidence that they were not the perpetrator are given new trials. See M.C.L. 770.16(8).

[23]See *People v Reed, supra,* 449 Mich at 378-79.

Further, were this Court to decide that it had the power to set free those it determines are "actually innocent," the decision would unconstitutionally infringe on the Governor's exclusive ability to grant pardons. Unless the Court is prepared to hold that prisoners who conclusively establish their innocence and who therefore cannot constitutionally be imprisoned may still be retried by the state,[24] then a grant of relief on grounds of actual innocence constitutes no more and no less than a pardon. But only the Governor has this authority, conferred by Article V, Section 14 of Michigan's Constitution, and any action by the judicial branch (regardless how it is termed by the Court) that serves as the equivalent violates the separation of powers enshrined in Article 3, Section 2. See *People v Erwin*, 212 Mich App 55, 63–64 (1995); *Makowski v Governor*, 299 Mich App 166 (2012) ("judicial actions that are the functional equivalent of a pardon or commutation are prohibited."). Put another way, this Court exercises plenary jurisdiction over the practice and procedure of the State's courts, authority which extends to the granting of new trials, see M.C.L. 600.223, but there jurisdiction ends. Deciding that a prisoner—who has been duly convicted in a trial that was unquestionably fair and whose sentence is otherwise valid—must be unconditionally released because his innocence claim has merit is

[24]When a defendant substantiates a freestanding innocence claim, "the defendant is considered truly innocent and is forever exonerated." *Montana v Beach*, 302 P3d 47, 53 (2013).

"pardon" by another name. If this or any other defendant can prove that he is in fact innocent, his meritorious claim for release must be granted by the Governor.

Finally, a finding by this court that MCR 6.508 or any other authority (such as MCR 7.316(A)(7)) provides grounds for judicial relief on a freestanding innocence claim would constitute an amendment to the rules governing motions for relief from judgment. Again, MCR 6.508(D)(3) unquestionably requires an underlying error before relief can be granted, and allowing freestanding claims would change that rule. But revisions to the court rules must first pass through the notice and public hearing procedures set forth in MCR 1.201, unless there is a need for immediate action. Even then, rule changes are subject to a post-adoption public hearing. MCR 1.201(E).[25] In other words, the Court should not engage in substantive rule-making at all, much less make far-reaching, substantive de facto amendments without benefit of input by the bench, bar, and general public.

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[25]Were this Court to incorporate a freestanding-innocence option in the MFRJ rule, important decisions regarding prima facie showings and ultimate standards would have to be made, such as what level of proof must a defendant establish before being entitled to a hearing, and what kinds of evidence are required? And, what is the standard a trial court must apply after a hearing? The answers to these questions are not self-evident.

iv. Defendant meets none of the criteria for actual innocence: (1) the new evidence he presents can't even be considered because it has already been rejected on direct appeal and because all of it was available at trial; (2) even if the evidence is considered defendant cannot show that no reasonable juror would otherwise have voted to convict him; and (3) there was no outcome-determinative constitutional error at trial.

As indicated in section A. above, defendant cannot meet the cause-and-prejudice requirements of MCR 6.508(D)(3); but he falls even farther short of the standard for actual innocence: all of his "new evidence" has been rejected on direct appeal, all of it was available at trial, and none of it requires a different result. Additionally, he cannot demonstrate any underlying actionable error at trial. Further, any freestanding claim of actual innocence (if there were such a thing) is practically farcical given the evidence against defendant, the insignificance of the new evidence he presents, and his status as a four-time felon. The evidence defendant says exonerates him consists of Joe Benke's and defendant's testimony at the evidentiary hearing; polygraphs from him, defendant, and Sharlene Stewart; and Mrs. Neault's medical records. But none of this evidence, either individually or taken together, meets even the most forgiving standard to prove actual innocence.

First, every one of these items was already considered and rejected after he presented it at the evidentiary hearing on remand during his direct appeal. Benke's testimony was rejected by the Court of Appeals as cumulative of Popa's and

Lockhart's, and defendant did not appeal that ruling to this Court. The argument regarding Mrs. Neault's medical records was rejected by both the trial court and the Court of Appeals, and this Court denied leave. The claims relating to his own testimony and the polygraphs were rejected by the trial court and not appealed. As demonstrated above, the exception for actual innocence contained in MCR 6.508(D)(3) does not apply to claims barred by 6.508(D)(2)—that is, those that have already been decided against the defendant in a prior appeal. All of defendant's factual claims have already been decided against him on direct appeal. Thus there is no new evidence for this Court to even consider under the actual-innocence exception.

Second, even if the Court ignored the stated terms of the actual-innocence portion of 6.508(D)(3) and the corresponding bar presented by subsection (D)(2), none of the proffered evidence is "newly discovered." That is, defendant cannot seriously assert that he did not know about (or could not reasonably discover) his own testimony or that of Benke. Similarly, there was nothing stopping him from procuring the polygraphs at issue, although obviously they could have had no effect on the trial. Likewise, with due diligence he could have subpoenaed Mrs. Neault's medical records, as the Court of Appeals has already held: defendant maintained from the very beginning that the victim was "senile," and even if he had no direct

knowledge of her mental acuity he knew she was in her 80's. "Actual innocence" requires newly discovered evidence, and defendant provides none.

But even if "new" evidence for purposes of actual innocence is merely evidence that defendant did not know about (as opposed to that which he *could have* discovered), then only Mrs. Neault's medical records would qualify. Again, however, that avenue is foreclosed by MCR 6.508(D)(2)—the Court of Appeals already affirmed that her diagnosis would not have caused a different result if it had been introduced at trial. Even considered anew, the possibility that the victim had unspecified memory issues does not invalidate her identification, and even if it did it would not overcome defendant's otherwise highly suspicious behavior and Gignac's testimony. Under Michigan law, the medical records have no bearing on any claim of actual innocence.

And in the further unlikely event that "new" evidence equals anything that wasn't actually introduced at trial, defendant still cannot prove that the four pieces he offers would have prevented any reasonable juror from voting to convict him. The polygraphs are not admissible and so could not change the outcome; defendant's and Benke's testimony is cumulative of the other alibi witnesses; the medical records are equivocal and hardly exculpatory. A reasonable juror could look at all the evidence

and still find Gignac's identification, defendant's suspicious conduct, and Mrs. Neault's excited utterances sufficient to convict.

Third, even if he could make the factual showing required by the MCR 6.508(D)(3) exception, defendant cannot make out an underlying legal error. His claim is that trial counsel rendered ineffective assistance as to Benke's testimony and Mrs. Neault's identification. But there is nothing in the record to counter the presumption that counsel had a reason not to call Benke—he surely knew about him. And, as indicated above (see footnote 5), there was no good reason to challenge Mrs. Neault's identification, either: it was not certain she was shown a single photo of defendant; even if so that is not necessarily unduly suggestive; and even if it were Mrs. Neault had an independent basis for her identification based on an hour spent with defendant four days earlier. And even in the unlikely event that counsel had been able to suppress Mrs. Neault's in-court identification, she still could have testified that the perpetrator was Craig from the furnace company, whom defendant acknowledged was him. Under these circumstances, it cannot possibly have been unreasonable to forego the identification challenge, nor could that decision have changed the outcome.

Finally, defendant cannot demonstrate a freestanding claim of innocence, were such a thing available. The basic conflict between defendant's alibi witnesses and the

People's identification witnesses was resolved by the jury at trial. All he can add is one more alibi witness who would have said the exact same thing as two others and some medical records which do not render Mrs. Neault's identification incredible. He also has no explanation for Shirley Gignac except to note that she initially thought he was older than he actually was. But this alleged discrepancy was considered at trial too. In reality what defendant wants is to re-litigate the trial in this Court, hoping for a better result. Even if freestanding claims of innocence were allowed, they should be reserved for truly innocent persons, not four-time felons who weakly maintain that this time they really didn't do it. Defendant is in no way entitled to relief.

RELIEF

THEREFORE, the People request this Honorable Court to affirm Judge Parker's denial of defendant-appellant's motion for relief from judgment. Additionally, the Court should hold that a defendant who cannot meet the cause-and-prejudice requirements of MCR 6.508(D)(3) must have his claims denied unless (1) he has new, reliable evidence that he did not know about at trial; (2) an underlying constitutional violation affected the outcome of his trial; and (3) he can prove that it is more likely than not that no reasonable juror would have voted to convict in light of the new evidence and absent the constitutional error. Further, the Court should rule that Michigan does not recognize a freestanding claim of innocence other than through the Governor's authority to grant pardons.

In the alternative, the Court may determine that this case is not a good vehicle for setting statewide precedent regarding claims of actual innocence on collateral review, and so issue an order dismissing the appeal because leave was improvidently granted. This is particularly so because defendant's motion for relief from judgment never mentioned the actual-innocence provision of MCR 6.508(D)(3).

Finally, even if this Court decides that Judge Parker should have considered a legal theory that defendant did not present, the only appropriate remedy is a remand to the trial court for review of defendant's factual claims under the updated rubric.

Respectfully submitted,

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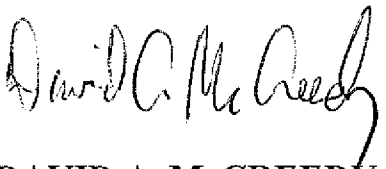

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